SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No:	AB 1618	**Hearing Date:**	July 2, 2019
Author:	Jones-Sawyer		
Version:	June 13, 2019		
Urgency:	No	**Fiscal:**	Yes
Consultant:	SC		

Subject: ***Plea Bargaining: Benefits of Later Enactments***

HISTORY

Source: Author

Prior Legislation: AB 1343 (Thurmond), Ch. 705, Stats. 2015
AB 267 (Jones-Sawyer), vetoed, 2015

Support: California Public Defenders Association

Opposition: None known

Assembly Floor Vote: Not relevant

This analysis reflect the bill as proposed to be amended.

PURPOSE

The purpose of this bill is to clarify that a plea bargain that requires a defendant to generally waive unknown future potential benefits of legislative enactments, initiatives, judicial decisions, or other changes in the law that may occur after the date of the plea is not knowing and intelligent, and thus void as against public policy.

Existing law defines "plea bargaining" to mean "any bargaining, negotiation, or discussion between a criminal defendant, or their counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant." (Pen. Code, § 1192.7, subd. (b).)

Existing law states that if the public offense charged is a felony not punishable with death, the magistrate shall immediately upon the appearance of counsel for the defendant read the complaint to the defendant and ask whether they plead guilty or not guilty to the offenses charged and to a previous conviction or convictions if charged. (Pen. Code, § 859a, subd. (a).)

Existing law provides that while the charge remains pending before the magistrate and when the defendant is present, the defendant may plead guilty to the offense charged, or with the consent of the magistrate and the prosecuting attorney, plead nolo contendere to the offense charged, or

to any other offense that is necessarily included in the charged offense, or to an attempt to commit the charged offense, or to any previous convictions charged. (*Ibid*.)

Existing law provides that if the defendant subsequently files a written motion to withdraw the plea, the motion shall be heard and determined by the court before which the plea was entered. (*Ibid*.)

Existing law states that every plea must be made in open court, and may be oral or in writing, shall be entered upon the minutes of the court, and shall be taken down in shorthand by the official reporter if one is present. All pleas of guilty or nolo contendere to misdemeanors or felonies shall be oral or in writing. (Pen. Code, § 1017.)

Existing law states that unless otherwise provided by law, every plea shall be entered or withdrawn by the defendant personally in open court. (Pen. Code, § 1018.)

Existing law provides that on application of the defendant at any time before judgment or within six months after an order granting probation is made if entry of judgment is suspended, the court may, and in case of a defendant who appeared without counsel at the time of the plea the court shall, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. (*Ibid*.)

Existing law states that where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as provided, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea. (Pen. Code, § 1192.5.)

Existing law provides that if the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, a the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so. The court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea. (*Id*.)

This bill states that the Legislature finds and declares all of the following:

1) The California Supreme Court held in *Doe v. Harris* (2013) 57 Cal. 4th 64 that, as a general rule, plea agreements are deemed to incorporate the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. That the parties enter into a plea agreement does not have the effect of insulating them from changes in the law that the Legislature has intended to apply to them.

2) In *Boykin v. Alabama* (1969) 395 U.S. 238, the United States Supreme Court held that because of the significant constitutional rights at stake in entering a guilty plea, due process requires that a defendant's guilty plea be knowing, intelligent, and voluntary.

3) Waiver is the voluntary, intelligent, and intentional relinquishment of a known right or privilege (*Estelle v. Smith* (1981) 451 U.S. 454, 471, fn. 16, quoting *Johnson v. Zerbst* (1938) 304 U.S. 458, 464). Waiver requires knowledge that the right exists (*Taylor v. U.S.* (1973) 414 U.S. 17, 19).

4) A plea bargain that requires a defendant to generally waive unknown future potential benefits of legislative enactments, initiatives, judicial decisions, or other changes in the law that may occur after the date of the plea is not knowing and intelligent.

This bill provides that a provision of a plea bargain that requires a defendant to generally waive future potential benefits of legislative enactments, initiatives, appellate decisions, or other changes in the law that may retroactively apply after the date of the plea is void as against public policy.

This bill defines "plea bargain" as defined in Penal Code section 1192.7, subdivision (b).

COMMENTS

1. Need for This Bill

According to the author of this bill:

> After the Prison Law Office in Berkeley brought forward a case against the California Department of Corrections and Rehabilitation (CDCR), a three judge court ruled that California had to reduce its prison population to 137.5% of capacity to abide by the constitutional rights of prisoners. The court made many findings in their ruling, including that overcrowding led to inadequate medical services, which violated their 8th amendment rights by not providing proper adequate care, and that reducing the prison population could be done without endangering public safety.
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> In 2011, the U.S. Supreme Court reaffirmed the decision in *Brown v. Plata*, ordering California to reduce its prison population to 137.5% capacity. In order to comply, California passed various legislation including, "The Public Safety Realignment Act" in 2011. Realignment, which created a shift in public policy on criminal justice reform, shifted the supervision of certain convictions from state prison to county jails.
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> In continuing criminal justice reform and to further reduce the prison population, a number of policy changes have been enacted via legislation and voter initiatives in recent years. Recognizing the need to reduce penalties for non-serious and non-violent property and drug crime the Legislature placed Proposition 47 on the ballot in 2014 and it passed with about 60% of the vote. In 2016 the Legislature placed Prop 57, which passed with 64% of the vote, on the ballot to provide increased parole opportunities for individuals serving sentences for non-violent crimes and authorized sentence credits for rehabilitation, good behavior, and education. As the Legislature and voters have made clear the need and desire to shift our justice system's focus to rehabilitation, recent reports have noted that prosecutors have begun to force defendants to sign away their rights from any future changes in law when entering a plea bargain.
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> Various court cases have made clear that plea bargains are subject to changes in state law, and must be entered in a knowing, voluntary, and intelligent manner by all parties. In Doe v. Harris the California Supreme Court ruled that "[p]lea

agreements are deemed to incorporate the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. That the parties enter into a plea agreement does not have the effect of insulating them from changes in the law that the Legislature has intended to apply to them." This ruling makes clear that plea bargains are still subject to the power of the state to make changes affecting sentencing standards. Furthermore, in *Brooklyn v. Alabama* the US Supreme Court held that holding "[s]ignificant constitutional rights [are] at stake in entering a guilty plea, due process requires that a defendant's guilty plea be knowing, intelligent, and voluntary."

Prosecutors that decide to have defendants sign away all future potential benefits from changes in state law circumvents the Legislative process and the will of the voters. When changes in state law resulted in increased penalties for individuals after they entered plea agreements prosecutors did not feel the need to pre-empt future legislation, and only appear willing to do so now that voters and the Legislature have begun to focus on reforming our criminal justice system. The Legislature is tasked with making changes in state law that affect all individuals equally, to have pockets of the state where future laws would have no impact because of the decision of local prosecutors is neither fair nor just.

2. Relevant Case Law

The issue of whether a plea agreement can bar a defendant from invoking a post-judgment change in law was recently considered in two cases.

In *People v. Wright*, (2019) 31 Cal.App.5th 749, the defendant pled guilty to transporting a controlled substance and admitted a prior conviction which triggered a three-year enhancement pursuant to Health & Safety Code section 11370.2. In the written plea agreement, the defendant waived his right to appeal, including among other things, "any sentence stipulated herein." Following his conviction, SB 180 (Mitchell), Ch. 677, Stats. 2017 was signed into law so that effective January 1, 2018 the three-year enhancement under Health & Safety Code section 11370.2 no longer applied to the crime for which the defendant had plead guilty. Another appellate court ruled held that the changes made by SB 180 applies retroactively to actions in which the judgement of conviction is not final. The defendant then appealed contending that the court should vacate the now inapplicable three-year enhancement from his sentence. (*People v. Wright*, supra, 31 Cal.App.5th at p. 753.)

The Fourth District Court of Appeal in *People v. Wright* concluded that Wright had not waived his right to appeal future sentencing error based on a change of the law which he was unaware of at the time he entered his plea. The court reasoned that while a plea bargain may include the waiver of the right to appeal, "the valid waiver of a right presupposes an actual and demonstrable knowledge of the very right being waived." (*People v. Wright*, 31 Cal.App.5th at p. 754.) The court, relying on *Doe v. Harris* (2013) 57 Cal.4th 64, also stated that "the general rule in California is that a plea agreement is '"deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy."'" (*Id*. at pp. 755, citing *Doe v. Harris*, supra 57 Cal.4th at p. 73.)

The court found that "Wright's waiver of his right to appeal his stipulated sentence cannot be construed as applying to a sentencing error of which he had no notice when he signed the plea agreement. Nothing in the record suggests that the parties considered or addressed the possibility that future legislation might abolish the required three-year enhancement for Wright's prior felony drug conviction. (*People. v. Wright*, supra, Cal.App.5th at 756.) The case was remanded to the trial court with directions to strike the three year enhancement from his sentence.

In *People v. Barton*, (2019) 32 Cal. App. 5th 1088, the Fifth District Court of Appeal disagreed with the *Wright* decision. In *Barton*, the defendant pleaded guilty to two drug-related counts and admitted two prior convictions which added two three-year sentence enhancements to her sentence pursuant to Health & Safety Code section 11370.2. As part of her plea agreement, the defendant signed a written waiver stating, in pertinent part, "I understand that I will be waiving my right to appeal and I will not be able to appeal from this Court's sentence based on the plea that I enter into in this matter." (*Id*. at p. 1093.) After defendant was sentenced, SB 180 (Mitchell), Ch. 677, Stats. 2017 was signed into law making the three-year enhancement inapplicable to the drug-related offenses that the defendant was convicted of. Defendant appealed seeking to have the two three-year sentence enhancements vacated from her sentence stating that there was nothing in the record to suggest that she knew of SB 180 when she entered into her plea.

The *Barton* court, relying on *Doe v. Harris*, supra, 57 Cal.4th 64 and *People v. Panizzon* (1996) 13 Cal.4th 68) which were also discussed in the *Wright* case, concluded that Barton's right to appeal was knowingly and intelligently waived. (*People v. Barton*, supra, 32 Cal. App. 5th at 1096.) In summarizing *Doe v. Harris*, the court stated that "parties to a plea agreement '"are deemed to know and understand that the state … may enact laws that will affect the consequences attending the conviction entered upon the plea."' (Citation omitted.) However, the parties can affirmatively agree, or reach an implied understanding, that '"the consequences of a plea will remain fixed despite amendments to the relevant law."' (Citation omitted.) '"Whether such an understanding exists presents factual issues that generally require an analysis of the representations made and other circumstances specific to the individual case."' (*Id*. at p. 1094.)

The court stated that "the dispositive inquiry is not whether or why subsequent events have transformed a prison term into an unauthorized sentence, but whether (1) the parties' plea agreement specified a particular sentence and (2) the waiver of appellate rights '"specifically extended to any right to appeal such sentence."' (*People v. Panizzon*, supra, 13 Cal.4th at p. 86.) The court found that the Barton's plea agreement included a stipulated term of incarceration and the waiver of her right to appeal the sentence. The court concluded that because the sentence imposed by the court was neither unforeseen or unknown at the time Barton executed the waiver and plea agreement, she knowingly and intelligently executed an enforceable waiver of the right to challenge her sentence on appeal. (*People v. Barton*, supra, 32 Cal.App.5th at p. 1098.)

The *Barton* court noted that their analysis conflicts with *People v. Wright*, supra, 31 Cal.App.5th 749, and reasoned that in the court's view, *Wright's* holding conflicts with controlling and dispositive case law, referring to *People v. Panizzon*, supra, 13 Cal.4th 68. (*People v. Barton*, supra, 32 Cal.App.5th at p. 1091.)

The California Supreme Court has granted review in *People v. Barton*. (Review granted 6/19/19.)

3. Impetus for this Bill

This bill appears to be in response to an article in the San Diego Union Tribune regarding a new provision that had been offered as part of a plea agreement in two separate cases prosecuted by the San Diego District Attorney's Office:

> The waiver has been offered in at least two cases, both murder cases. In one case in North County the plea deal with the waiver was rejected. In a second case in South Bay a jury deadlocked on murder charges against Victor Sanchez in early March. Then on April 10 he pleaded guilty to the lesser charge of voluntary manslaughter with an 11 year sentence — and the waiver.
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> The wording of the waiver offered in the North County case is sweeping. "This agreement waives all future potential benefits of any legislative actions or judicial decisions or other changes in the law that may occur after the date of this plea, whether or not such future changes are specifically designed to provide pre- or post-conviction relief to any convicted defendants, and whether or not they are intended to be retroactive," it reads.
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> Under the law, plea agreements are considered binding contracts among all parties. They usually contain a general waiver — the legal term where someone voluntarily gives up their rights — to appeal a ruling or sentence in a case.
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> The state Supreme Court has ruled that when agreeing to a plea deal, all sides are deemed to understand that the law can change in the future, and that the parties to the plea deal aren't protected from those changes. The decision came in the case of a registered sex offender, who said amendments to the law after he registered that allowed for publication of some personal information violated his plea deal.
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> That principle was upheld in January in a decision by the 4th District Court of Appeal in San Diego, where defendant Justin Wright agreed to an 11-year sentence for selling drugs. But when the Legislature passed a law in 2017 that eliminated a three-year sentencing enhancement for prior drug convictions, Wright went to court and argued the law was retroactive and he should now get the three years removed from his sentence.
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> The court ruled for Wright. But in the decision, Associate Justice Gil Nares indicated that a waiver like the one San Diego prosecutors are using, would be workable.
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> "If parties to a plea agreement want to insulate the agreement from future changes in the law, they should specify that the consequences of the plea will remain fixed despite amendments to the relevant law," he wrote.

(Moran, *After waves of criminal justice reforms, prosecutors now want to lock in pleas, ask defendants to give up future rights*, San Diego Tribune (Apr. 17, 2019) <https://www.sandiegouniontribune.com/news/courts/story/2019-04-17/after-waves-of-criminal-justice-reforms-prosecutors-now-want-to-lock-in-pleas-ask-defendants-to-give-up-future-rights> [as of June 17, 2019].)

This bill would make such provisions in a plea bargain void as against public policy on the basis that a guilty plea must knowing, intelligent, and voluntary and any waiver of rights within a plea agreement shall accordingly be a voluntary, intelligent, and intentional relinquishment of a known right or privilege. Any waiver of unknown future potential benefits is not knowing, and intelligent.

4. Amendment

The author intends make a technical amendment to subdivision (b) of Penal Code section 1016.8 in the bill as follows:

(b) A provision of a plea bargain that requires a defendant to generally waive future potential benefits of legislative enactments, initiatives, ~~judicial~~ ***appellate*** decisions, or other changes in the law that may retroactively apply after the date of the plea is void as against public policy.

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